BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: MCI WORLDCOM, INC. 333 Bush Street San Francisco, CA 94104 Employer	Docket Nos. 00-R1D1-440 through 442 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. This decision is rendered in response to a petition for reconsideration filed by the Division of Occupational Safety and Health (Division).

JURISDICTION

Beginning August 23, 1999, a representative of the Division investigated a fatal accident that occurred at a place of employment located at Ritch and Brannan Streets, San Francisco, California. Mr. Andrew Roa, among others, was hired by OSP Consultants, Inc. (OSP) to locate and protect fiber optic cables owned by MCI Worldcom, Inc. (Employer) pursuant to a contract between OSP and Employer. Mr. Roa was performing this work on a public street when he was killed by a hit-and-run driver.

On January 26, 2000, the Division cited Employer for serious violations of section 8604(a) [not providing vehicular traffic devices for contractor employees] and section 8604(d) [not complying with vehicular traffic warning requirements in the referenced Department of Transportation manual], and for general violations of section 8602(e) [not providing first aid materials to contractor employees] and section 3203(a) [not implementing IIPP procedures governing contractor employees]. Employer filed a timely appeal, which only contested the existence of an employer-employee relationship between it and the OSP locators, including Mr. Roa.

The ALJ concluded that a dual employer relationship existed in which Employer was Mr. Roa's secondary employer. The ALJ, however, granted the appeals except the one pertaining to section 3203(a), which was sustained.

The Division sought reconsideration of the decision to grant the appeals from sections 8602(e), 8604(a) and 8604(d). In its petition for reconsideration, the Division alleged that the ALJ exceeded his powers by concluding that the violations of sections 8602(e), and 8604(a) and (d), "did not exist." The Division argued that this finding violated its due process rights because the ALJ expanded the appeal to address the violations' existence without advance notice to the Division. The Division further contended that the evidence did not justify the findings of fact and that the findings of fact did not support the decision.

Employer answered the Division's petition and argued, among other things, that the ALJ erred in finding that it was a secondary employer. The Division moved to strike this argument and asserted that Employer would have needed to file its own motion for reconsideration to contest this issue, which it did not do. Employer, in turn, responded to the Division's motion to strike.

EVIDENCE

OSP sent Mr. Roa to San Francisco to locate and protect Employer's fiber optic cables, which were located near ongoing construction work being conducted to lay fiber optic cables for a consortium known as "Level 3." Employer's cables' proximity to the construction work made them vulnerable to damage. The locators worked at night,[1] because the city-issued permits only allowed the construction crews to work at night in order to minimize traffic interference, and the locators often needed to work in concert with the construction crews.

The locators' work involved two primary components. First, they would work along side the Level 3 construction crews[2] and ensure that the crews stayed a safe distance from the cables. For this part of the job, the locators worked within the construction crews' safety zones. The other aspect of the job involved working ahead of the construction crews and marking the ground surface to identify the cables' placement at locations specified on Underground Service Alert (USA) tickets.[3] The information on the USA tickets regarding the locations and deadlines for the work was provided by the Level 3 construction

[1] We acknowledge that there was disparate evidence regarding the need to conduct the USA work at night (described below), but because much of the work was performed at night, this inconsistency does not affect our analysis.

[2] The construction crews were not comprised of Employer's personnel nor did they work for Employer.

[3] These tickets are used to ensure that subsurface utility installations are properly marked in advance of construction work. See, Government Code section 4261.1, et seq. and Construction Safety Order, section 1541.

crews. While performing this work, the locators themselves needed to create any safety zone they could contrive.

The locators' work was driven by the construction crews. Either the locators were working alongside the crews or they worked at locations designated by the construction crews that were stated on USA tickets.

Neither OSP nor Employer conducted any inspections or provided regular oversight of the workplace. Although the contract between OSP and Employer afforded Employer the right to have OSP provide a lead person on the job, Employer apparently declined to exercise this option on this particular job.[4]

While OSP provided no on site presence whatsoever, an Employer representative served as a contact person for the OSP locators. Dick Drussell, Field Engineer III, held an hourly, non-supervisory position with Employer. His duties included splicing and locating fiber optic cables, watching construction crews working near Employer's cables, transferring telecommunications "traffic" from one port to another and office work. Drussell was supervised by Don Hurla, MCI Manager for the relevant geographic area. Other than Drussell, no Employer personnel had regular contact with the locators and no Employer personnel worked with the locators.[5]

When the OSP locators arrived in San Francisco, Drussell introduced them to the Level 3 work locations and subsequently saw them a few times a week for short visits. He primarily delivered USA tickets to the locators for them to divide among themselves. Unlike the locators, Drussell worked the day shift. He did not train the locators, tell them how to do their work, accompany them while they worked, evaluate them, contact OSP about them, set deadlines for them, or discipline them. In one instance, he informed a locator that he need not return to work on Employer's project based on feedback Drussell received from one of the construction contractors.

In addition, neither OSP nor Employer provided the locators with safety equipment.[6] The locators purchased their own personal protective equipment and they occasionally borrowed warning signs and safety cones from the construction crews to form a barrier around their work location. It is not clear that either OSP or Employer knew the locators borrowed this equipment. At least one locator used his personal truck, which was equipped with a bubble flasher, as a crash barrier. Another locator asserted that he lacked the

[4] We agree with the Division's contention raised in its petition for reconsideration that the burden was on Employer to request a lead person and that the contract amendment addressing this issue superseded the underlying contract language regarding OSP supervision. This issue, however, does not affect our decision and we do not address it further.

[5] The record reflects that Hurla had contact with at least one locator on one occasion, but it did not involve a safety issue.

[6] OSP provided the locators with some equipment, including transmitters and cell phones, the last of which was required under its contract with Employer. Employer provided paint and stick flags for marking ground surfaces.

automobile insurance necessary to expose his vehicle to this risk and he did not know if OSP had the requisite insurance.

On August 11, 1999, Roa and another OSP locator, John Eicher, were working at night to re-paint surface markings on a public street that had been recently paved over. No construction work was occurring and the work was not specifically done in response to a USA ticket.

Eicher and Roa borrowed a reflector-equipped cone from a construction crew to alert cars to their presence. Nonetheless, Roa was struck by a hit-and-run driver, and died from his injuries. According to Eicher, no barricade equipment with lights was available at the time. Drussell was at home in bed when he received a phone call from Eicher informing him of the accident. Drussell was unaware of the work Eicher and Roa were performing that night until he received Eicher's call.

The Division submitted into evidence Employer's Injury and Illness Prevention Program, excerpts of its safety procedures and the contract between Employer and OSP pertaining to the locators' work.

ISSUE

Were the appeals from sections 8602(e), 8604(a) and 8604(d) properly granted?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board has long held that employers may be held responsible for Title 8 safety order violations under the dual employer theory of liability. *Optical Coating Laboratory, Inc.*, Cal/OSHA App. 82-1093, DAR[7] (Sept. 28, 1984); *C. L. Peck Contractor*, Cal/OSHA App. 80-844, DAR (Oct. 17, 1985); *Petroleum Maintenance Co.* (PEMCO II), Cal/OSHA App. 81-594, DAR (May 1, 1985); *Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, DAR (Oct. 31, 2001); *Oasis Springs Corp.*, Cal/OSHA App. P95-2137-009 DAR (Feb. 18, 1998). Board precedent holds that an employer who has the right, whether or not exercised, to control and direct the employees of a primary employer is the secondary employer of those workers.[8] *Optical Coating Laboratory Inc.*, *supra*. The right to control need not be complete. *Id.*

[7] References in this document to DAR refer to Decisions After Reconsideration by the Appeals Board.

[8] This analysis does not apply to citations issued under the multi-employer provisions (i.e., sections 336.10 and 336.11). The citations at issue here were not issued under these provisions.

Based on our review of the record, we adopt the ALJ's conclusions that the contract between OSP and Employer afforded Employer some rights to control and direct the OSP locators' work and that Employer exercised these rights in some instances. As a result, we concur that a dual employment relationship existed here and we adopt the ALJ's finding that Employer was the OSP locators' secondary employer. [9]

The Division seeks reconsideration of the decision to sustain the appeals from the section 8602(e), 8604(a) and 8604(d) citations. Although the Division did not address the section 3203(a) citation in its petition, our analysis of the sustained appeals is inextricably interwoven with an outstanding question of law pertaining to the section 3203(a) citation that was not properly resolved below and which we have yet to address. See, *Gonzales* v. *R.J. Novick Construction Company*, (1978) 20 C.3d 798; *California* v. *Bragg* (1986) 183 Cal. App. 3d 1018, 1023.

We do not believe we can properly review the decision to grant Employer's three appeals without determining whether section 3203(a) was properly interpreted and applied in the Decision. This is so because, in this instance, and as detailed further below, the responsibilities specified in section 3203 to identify and correct workplace hazards, and to train employees about them, bears on Employer's duty to provide the needed safety equipment at issue. Because we believe Employer's duty to provide the safety equipment at issue is interdependent with its responsibilities as a secondary employer under section 3203, we address the latter citation, as well.

In addition, given that section 3203 is the safety order most frequently cited by the Division,[10] we believe this issue presents an important matter of public policy that we may review and that merits our attention. See, *In re Marriage of Weaver* (1990) 224 Cal App.3d 478; *Fox* v. *State Personnel Board* (1996) 49 Cal App 4th 1034, 1040; *Sierra Wes Drywall, Inc.,* Cal/OSHA App. 94-1071, DAR (Nov. 18, 1998) (Fn 2). Accordingly, we first address the sustained section 3203(a) violation.

1. Employer did not violate section 3203(a).

In addressing dual employment, we have held that the primary and secondary employers have different roles and responsibilities under the Occupational Safety and Health Act. *PEMCO II*, *supra*. This approach has been accepted by the courts and adopted by the Legislature. Specifically, *Sully Miller Contracting Company* v. *California Occupational Safety and Health Appeals Board*, 138 Cal.App.4th 684 (3d Dist 2006), addressed the relative roles

[9] Because we conclude that Employer was a secondary employer, we find the Division's Motion to Strike Employer's contention that no employer-employee relationship existed, which it raised in its answer to the petition, is moot and we decline to rule on it explicitly.

[10] We take official notice of statistics provided by the Division's Budget and Program Office, which indicate that section 3203 was the most frequently cited Title 8 safety order in 2006. (Title 8, section 376.3).

of primary and secondary employers under California Labor Code section 6401.7. This section pertains to injury and illness prevention programs (IIPP) and provides the statutory basis for Title 8, section 3203, which also addresses IIPPs. Section 6401.7, like section 3203, requires every employer to establish, implement and maintain an effective IIPP, and specifies required components for the program.

In 1991, the Legislature amended Labor Code section 6401.7 to add subsection (h), which states, in relevant part,

> (h) The employer's injury prevention program, as required by this section, shall cover all of the employer's employees and all other workers who the employer controls or directs and directly supervises on the job to the extent these workers are exposed to worksite and job assignment specific hazards. Nothing in this subdivision shall affect the obligations of a contractor or other employer that controls or directs and directly supervises its own employees on the job.

The *Sully Miller* court recognized that, in *PEMCO II, supra*, the Board assigned certain duties to a primary employer. *Id. at 750.* The court reviewed those responsibilities and stated that section 6401.7(h) codifies our holding in *PEMCO II* with respect to primary employers. *Id.* The court further noted that *PEMCO II* did not afford the Board the opportunity to identify a secondary employer's responsibilities and stated, "[i]t was in this context that in 1991, the Legislature added subdivision (h) to section 6401.7." *Id. at 750*.

The court reviewed the legislative committee reports pertaining to the addition of subsection (h), and noted that they "uniformly indicate" that the need for subsection (h) "arose because existing law at the time neglected the safety needs of contracted employees who work with an employer's own workers." *Id.* The court concluded,

> In sum, subdivision (h) serves to impose training obligations on a secondary employer who directly supervises contract employees employed by another employer. It in no way alters the established training obligations of an employer to primary employees . . .

Id. at 750.

Accordingly, the courts and the Legislature have agreed that primary and secondary employees may have distinct duties and responsibilities under section 6401.7. Specifically, a primary employer must include all its employees in its IIPP, and a secondary employer must include those employees "who the employer controls or directs and directly supervises on the job..." *Labor Code section 6401.7(h).*

In the present matter, Employer was the OSP locators' secondary employer. As a result, under section 6401.7(h), Employer would need to apply its IIPP to the OSP locators if it controlled or directed, *and* directly supervised, them on the job. We note that the phrases "controls or directs" and "directly supervises" are written in the conjunctive. It is therefore evident that both factors must be present before a secondary employer must apply its IIPP to contract employees.[11]

We now turn our attention to Title 8, section 3203, which is derived from Labor Code section 6401.7.[12] To be effective, regulations must be consistent and in concert with the underlying statute. *Pulaski* v. *California Occupational Safety and Health Standards Board (3d Dist 1999) 90 Cal.Rptr.2d 54;* California Government Code section 11342.2. Accordingly, we must interpret section 3203 consistent with our understanding of Labor Code section 6401.7.

While section 6401.7(a) and section 3203(a) both state that "every employer" shall establish, implement and maintain an effective IIPP, the Legislature unequivocally clarified the extent to which an employer is responsible for applying its IIPP to workers other than its own employees by adding subsection (h) to section 6401.7. Because section 3203 must be read consistent with section 6401.7, we interpret section 3203 to contain the same limitation. To find otherwise would mean that the regulation impermissibly exceeds the scope of the statute.[13] *Id.* Accordingly, we hold that before a secondary employer may be found to have violated section 3203(a), the Division must demonstrate that the secondary employer directed or controlled and directly supervised the employees.[14]

We now apply our findings to the present case. While the record contains evidence that Employer exercised minimal control and direction of the OSP locators, it is devoid of any showing that Employer directly supervised them.[15] The record demonstrates that Employer: provided no training to the locators; did not accompany them while they did their work; did not set their

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[11] Under accepted canons of statutory construction, we must "give meaning to each word if possible and avoid a construction that would render a term surplusage." *Sully-Miller Contracting Company* v. *California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal.App.4th 684, 695. The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. *Auchmoody* v. *911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517.

[12] See, reference and authority citations listed following section 3203 in Barclay's edition of Title 8.

[13] We note that section 3203 was not amended in response to the addition of subsection (h) to section 6401.7.

[14] The ALJ's Decision could be read to suggest that, if the secondary employer has the "*ability to* directly supervise" the contract employees, it is sufficient to support a citation. We believe the statutory language clearly requires that the employer actually provide direct supervision before the secondary employer incurs a legal obligation.

[15] We acknowledge that Employer removed one locator, Gary Esmond, from the locating work and gave him a different assignment in which he received greater supervision by Employer. We have little evidence regarding that assignment and, as a result, we do not consider it in our analysis. Moreover, while the parties stipulated that all of the locators worked under the one contract submitted into evidence, the stipulation was limited to the locating work performed in San Francisco for the Level 3 project. Accordingly, Esmond's alternative assignment appears irrelevant to the matter at issue.

hours; only had brief encounters with them a few times a week through an hourly, non-supervisory employee; did not set their deadlines; did not tell them where to conduct their work; did not evaluate them; and did not assign them specific tasks.[16] Indeed, the ALJ found, and we agree, that the scant testimony alleging that Employer directly supervised the locators' work is neither credible nor supported by the record.

Moreover, our review of Employer's safety procedures persuades us of Employer's intent to act consistent with section 6401.7(h). Specifically, the "Scope" section of the IIPP references "The MCIT Environmental and Safety Procedures, Volume II" (Safety Procedures) and states that the Safety Procedures "shall also be reviewed for applicable requirements of the MCIT Health and Safety Program."

The referenced Safety Procedures[17] contain a section entitled "Contractors Safety Guidelines" that define "contractors" and "contracted personnel"[18] as follows:

> Contractors are hired for a specific job or project and are not directly supervised by an MCI employee. Contracted personnel, in contrast, work under the direct supervision of an MCI employee, and are required to follow health and safety practices as outlined in MCI's Environmental & Safety Procedures Manual.

Accordingly, the Guidelines specify that only contract employees who are under its "direct supervision" must adhere to Employer's health and safety practices. We believe the evidence clearly demonstrates that OSP was a contractor[19] and that the locators were not "directly supervised by an MCI employee." As a result, it is clear that Employer did not intend the locators to follow its Safety Procedures, nor did it intend to apply its Procedures to them.

We note that the express intent of the "Contractors Safety Guidelines," is to "assist MCI personnel in the contractor selection process, and to help MCI Management to monitor the contractors after they have been selected to ensure that *safe work practices and procedures are observed by contractors*" (emphasis added). It is noteworthy that the Guidelines do not say that the contractors

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[16] Some evidence in the record indicates that Drussell initially assigned some locators to work with specified construction crews. Even if this is true, it does not support a finding of "direct supervision."

[17] Employer did not provide the Division with a complete copy of its Safety Procedures. Our review is based on the excerpt submitted by the Division and admitted into evidence.

[18] We recognize that Employer's IIPP states that it applies to MCI employees and "contractor personnel." While the latter term is not defined, it would be nonsensical to include "contractor" employees in the IIPP and to simultaneously exclude them from the requirement to comply with the applicable Safety Procedures. As a result, we decline to read "contractor personnel" to include the employees of "contractors," as defined in the Safety Procedures. Moreover, as discussed below, the Guidelines appear to provide an alternative process to ensure that contractor employees work safely.

[19] Throughout the contracts between OSP and Employer, OSP is referred to as "contractor." The ALJ also found that the record supports a finding that OSP was an independent contractor.

must abide by *Employer's* safe work practices, or words to that effect. Rather, "safe work practices and procedures" is stated generically.

While the Contractors Safety Guidelines clearly apply to contractors, such as OSP, the Guidelines do not appear to be part of the IIPP, nor will we assume an intent to include them in the IIPP based on their placement in the Safety Procedures Manual.[20] We note the unambiguous language in the IIPP stating that the Safety Procedures are to be reviewed for "*applicable* requirements of the MCIT Health and Safety Program." It is apparent that the Safety Procedures, as a whole, are not part of the IIPP. Moreover, we will not assume that Employer chose to act beyond its legal obligations under section 6401.7(h) and section 3203 without greater evidence to support that conclusion.

Instead, consistent with the Guidelines' express language, they appear to provide a recommended method to achieve the stated objective of selecting and monitoring contractors to ensure they work safely. This view is also consistent with the testimony of Scott Stonehocker, Employer's Senior Contract Analyst for this transaction, who explained that Employer seeks to retain the authority to audit a contractor's work. The Guidelines, in fact, appear to serve as a means separate from the IIPP to ensure that contractors adhere to safe practices, which would be unnecessary if the IIPP itself and the applicable Safety Procedures pertained to the contractors.[21] Although Employer may have neglected to follow its Guidelines in this instance, and may have failed to secure a safe contractor as a result, its lapse does not constitute a violation of section 3203(a), which pertains only to the establishment, implementation, and maintenance of an employer's IIPP.

The ALJ found Employer violated section 3203(a) by failing to implement provisions contained in the Guidelines. Because we find that the Guidelines were not, nor intended to be, part of the IIPP, we must reverse this part of the decision. Similarly, because we conclude that the OSP locators, as contractor employees, were not covered by Employer's Safety Procedures, we cannot base a section 3203(a) violation on Employer's failure to ensure that the traffic control provisions contained in the Safety Procedures were implemented.

In sum, based on the language of Labor Code section 6401.7(h), our interpretation of Title 8, section 3203(a), the language of Employer's IIPP, as well as the language and nature of the Contractors Safety Guidelines, we conclude that Employer was not obligated to, nor did, include the OSP locators in its IIPP and did not fail to implement provisions in it with respect to the

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[20] Placement of the Guidelines in the Safety Manual causes confusion, but we will not elevate form over substance and give greater meaning to the location of the Guidelines than to their express language as well as the express terms of the Manual itself, neither of which supports the conclusion that contractor employees are to adhere to Employer's safety policies.

[21] For example, the IIPP assigns oversight roles to designated individuals with various titles. The Guidelines designate different oversight positions than those specified in the IIPP.

locators. As a result, there was no basis for the section 3203(a) citation. We reverse this part of the Decision below and grant Employer's appeal.

2. The appeals from sections 8602(e), 8604(a) and 8604(d) were properly granted.

Before addressing the merits of Employer's appeals from the referenced citations, we respond to the Division's contention that the ALJ acted in excess of his powers by granting them. While the Division asserts that the ALJ found these violations "did not exist," we find no support for this position. Rather, the ALJ concluded that OSP, not Employer, was *responsible* for the violations and thus granted *Employer's* appeals.

The Decision states, and we have consistently maintained, that finding a dual employment relationship does not automatically render each employer responsible for every aspect of the contract employees' safety. See, e.g., *Optical Coating*, *supra; C. L. Peck, supra*; *PEMCO, supra*; *Sully-Miller, supra.* Given the Board's lengthy history of assigning different roles and responsibilities to primary and secondary employers, we believe that determining the employers' relative liabilities is an implicit and fundamental component of the employer-employee analysis once the existence of an employment relationship is placed at issue.

The Board has, for example, determined that the provision of personal protective equipment is the primary employer's responsibility. *PEMCO, supra.* Similarly, the Board has held an employer in a dual employment setting to be responsible for one violation and not another. *The Office Professionals,* Cal/OSHA App. 92-604, DAR (June 19, 1995). And, as we explained above, not all secondary employers are liable under section 3203(a). Although the right to exercise direction and control over secondary employees is sufficient to substantiate a dual employment relationship, alone it is insufficient to support a finding of liability.

Although we reach our conclusion for somewhat different reasons, we find that the ALJ arrived at the correct result and acted well within his authority. The ALJ applied Board precedent to the facts of this case and found that Employer was not liable for the violations; he did not find that the violations did not exist.

We now consider the relevant citations. As noted in the Decision, the Board focuses on several considerations to determine if an employer in a dual employment setting bears responsibility for a given duty. *Optical Coating, supra; C.L. Peck Contractor*, Cal/OSHA App. 80-844, DAR (Oct. 17, 1985); *Adia Personnel Services*, Cal/OSHA App. 90-1226, DAR (Aug. 4, 1992). Among the factors we consider are: which employer is in the best position to abate a condition; which employer is responsible for daily oversight; which has control of the work site; who actually exercises supervision; and which employer is

most responsible for exposing the worker to the hazardous work activity. *Id.* We hold that these factors support a finding that only OSP was liable for the violations in question.

As we have seen, neither Employer nor OSP exercised supervision of the OSP locators or the worksites. Similarly, neither employer had control of the sites where the locators worked. Rather, the locators' work was driven by the construction crews and the worksites, to a large extent, were under the construction crews' control. Employer did not own or operate the workplaces where the OSP locators were situated; the locators worked on public streets.

Board cases which have upheld citations against secondary employers have all held that the employer provided meaningful control over the worksite or the secondary employees. *Optical Coating, supra; C.L. Peck, supra; Dutchman Plastering, Inc.* Cal/OSHA App. 90-594, DAR (Feb. 8, 1991). We distinguish these cases from the present matter on this basis. Employer's minimal acts of direction and control do not constitute such meaningful control.

Bruin Painting Corp., Cal/OSHA App. 96-2044, DAR (Oct. 4, 2000), while distinguishable from this matter, presents a somewhat similar fact scenario to the one we now consider. We conclude that we must disapprove *Bruin Painting, supra*, because there, as here, the employer's minimal involvement did not constitute meaningful control and the employer should not have been held accountable for the violation that occurred.

Further, in analyzing dual employment situations, the Board has long held that primary employers have specified training, inspection, and monitoring responsibilities for the employees they send to work for a secondary employer. *PEMCO II, supra; Adia Personnel, supra; Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, DAR (Oct. 30, 2001). These obligations include a duty to determine with particularity the nature of the work the employees are to perform. *Id.* The Board has further held that any failure to fulfill these responsibilities subjects the primary employer to responsibility for violations not involving training or monitoring that occur while its contract employees are working for a secondary employer. *Sully-Miller (DAR), supra*.

It is undisputed that OSP, as the locators' primary employer, was responsible for the specified training, inspection and monitoring of the worksites. OSP also bore a responsibility to identify and correct occupational hazards at these worksites under section 3203. The record amply supports that OSP failed to do so.[22] Had OSP fulfilled these obligations, it would have known that its employees were working at night without proper safety

[22] As noted in the Decision, the Board's official, public records demonstrate that OSP withdrew its appeal of its section 3203(a) violation.

equipment. We agree with the ALJ that OSP's failure to fulfill its duties did not render Employer responsible for them.

As the OSP locators' secondary employer, Employer did not share these inspection, training, and monitoring responsibilities. We have already determined that Employer bore no duty under section 3203 to identify and abate workplace hazards as a secondary employer because Employer did not directly supervise the OSP locators. Accordingly, Employer was not required to inform itself about the worksites in order to fulfill any IIPP requirements. In addition, under the facts presented here, we see no reason why Employer incurred a duty, independent of section 3203, to inspect and monitor the workplace.

It is significant that Employer was not a primary employer of its own employees at the locators' worksites; none of Employer's personnel were present.[23] Because section 3203 and Board precedent require primary employers to be knowledgeable about the workplace, a secondary employer who is also a primary employer at the worksite might, indeed, be responsible for providing daily oversight, might exercise meaningful control of the workplace, might be in the best position to abate the hazards in question, or might be most responsible for abating them.[24] This was not the case here.

In addition, we see no evidence that Employer was otherwise informed of the conditions under which the OSP locators were working. Again, had Employer been so informed, there might have been a basis on which to conclude it was in the best position to abate the relevant hazards or been most responsible for exposing the locators to them.

Here, the only Employer representative who had regular contact with the locators was Drussell, an hourly employee who paid the locators short visits a few times a week.

Although the record demonstrates that one of the locators, John Eicher, repeatedly complained to Drussell about the need for safety equipment, we disagree with the ALJ's conclusion that Drussell was a "supervisor" under the Act. The ALJ found Drussell to be vested by Employer with sufficient safety responsibilities to deem him to be a "supervisor." See, e.g., *Jerry W. Winfrey dba Jerry's Electrical Service,* Cal/OSHA App. 91-1287, DAR (July 29, 1993). As a supervisor, Drussell's knowledge would be imputed to Employer. *Shea-Kiewet-Kenny,* Cal/OSHA App. 94-2768, DAR (July 23, 1999), citing, *City of Sacramento,* Cal/OSHA App. 93-1947, DAR (Feb. 5, 1998).

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[23] We do not believe Drussell's brief visits to the worksites were sufficient to render Employer a primary employer with respect to them.

[24] In some of the existing cases in which secondary employers were found liable, the employers were also primary employers at the worksites. *Optical Coating, supra; C.L. Peck, supra.* These cases are distinguishable from the present matter on this additional basis.

We see no evidence, however, to support a finding that Drussell was delegated any responsibility for ensuring that other employees followed applicable safety rules. It seems that the ALJ reached this conclusion based on an inference that Drussell was a "contract liaison" as described in the Contractor Safety Guidelines. The contract liaison, among other things, is charged with: ensuring that contractors work in a safe manner; informing Employer if a contractor fails to do so; and for stopping imminently hazardous activity.[25] The record does not reflect that Drussell performed these or any other safety duties assigned to a contract liaison. Indeed, Drussell's unrefuted testimony was that he had not read Employer's Safety Procedures, so he would have been unfamiliar with the Guidelines and the contract liaison's duties. In addition, we see no evidence to suggest he made any effort to enforce or explain safety requirements, or that he was assigned to do so.

As suggested in the Decision, an alternative, and, we conclude, more logical inference in this instance is that Employer failed to designate a contract liaison and did not provide any meaningful safety oversight for the OSP locators. While Employer's failure to follow its own advice may have been ill-advised, it does not render Employer liable here.

Because we conclude that Drussell was not a "supervisor" under the Act, any information he had regarding the locators' working conditions cannot be imputed to Employer. *Shea-Kiewet-Kenny, supra*. In addition, there is no evidence that any other Employer representative was aware of the locators' working conditions.

Although Eicher testified that Drussell told him that he (Drussell) would discuss Eicher's concerns regarding the lack of safety equipment with his own (Drussell's) manager, Don Hurla, Eicher testified that Drussell told him (Eicher) that he failed to follow through because Hurla "never listens to what I (Drussell) have to say." Eicher further testified that Drussell indicated he would speak with Hurla after making the previous comment, but Drussell testified that he did not recall discussing the safety issues with Hurla. Eicher conceded that he did not talk to Hurla directly and Hurla, for his part, did not testify at the hearing.

In sum, OSP was responsible for training and monitoring its employees, inspecting the worksite, and discerning the nature of the work the employees would perform with particularity. As the Board has previously stated, "the

[25] The Guidelines specify, among other things, that the liaison is responsible for interfacing with the contractor regarding its safety activities and to bring deficiencies in the *contractor's* safety procedures or practices to the contractor's attention. The liaison is further charged with stopping an activity and taking immediate steps to correct any unsafe condition in the case of imminent danger. In such circumstances, the liaison is to write to the contractor and inform it that it will be responsible for the expense of the corrections undertaken. The liaison is also responsible for keeping Employer's management advised of general safety compliance by the contractor. The record demonstrates that Drussell's only safety interaction with OSP was to be the recipient of Eicher's concerns, he neglected to undertake any corrective measures, and failed to inform Employer's management of OSP's safety lapses.

upfront participation of a primary employer is crucial to employee safety . . . . if the primary employer fails to conduct an inspection of the secondary employer's work site, it can provide no meaningful information to its employee regarding foreseeable hazards." *Manpower,* Cal/OSHA App. 98-4158, DAR (May 14, 2001).

Employer, for its part, had no comparable responsibility. The OSP locators were not covered by its IIPP and we see no evidence that Employer was informed of the locators' working conditions or lack of safety equipment. In addition, Employer was not a primary employer at these worksites, so lacked an independent duty to be alert to hazards and provide supervision. Finally, Employer did not exercise any meaningful direction or control over the locators, or provide daily oversight. Based on all the above, Employer cannot properly be found to have been in the best position to abate the hazards or to be most responsible for exposing the workers to the hazardous activities.[26]

In so holding, we do not suggest that only one employer can ever be responsible for safety violations. Rather, we hold that these determinations must be made on a case-by-case basis, and, under the facts of this case, we find that only OSP may properly be held liable for the violations at issue. Given these facts, we do not find a legitimate basis on which to hold Employer accountable for the referenced violations. In this instance, there was a strong disparity in the relative roles and responsibilities of the two employers involved that cannot be ignored.

3. Section 8604(d) was improperly cited.

We further find that the citation to section 8604(d) was improper on an independent basis. Section 8604(d) states, "Employer shall require employees exposed to vehicular traffic hazards outside the protected area to comply with the provisions specified in Section 1599 of the Construction Safety Orders." Section 1599 is entitled "Flaggers" and the entire section pertains to flaggers. Subsection 1599(a) states, "Flaggers shall be utilized at locations on a construction site where barricades and warning signs cannot control the moving traffic." At the time of the accident, subsection (c) stated, "Placement of warning signs shall be according to the 'Manual of Traffic Controls for Construction and Maintenance Work Zones – 1996', published by the State Department of Transportation, which is herein incorporated by reference and referred to as the 'Manual'."

Subsection (c) does not specifically refer to flaggers, but documents contained in the official rulemaking file maintained by the Occupational Safety and Health Standards Board[27] for an amendment made to this subsection in

[26] OSP's distance from the worksite and Employer's relative proximity to it is of no consequence. See, *Cal-Cut Pipe & Supply Co,* Cal/OSHA App. 76-955, DAR (Aug. 26, 1980). If OSP considered the distance too great, it could have coordinated with Employer to fulfill its duties. *Sully Miller*, *supra*.

[27] We take official notice of the Standards Board's rulemaking file pursuant to section 376.3.

1992 clarifies that the subsection pertains to the proper placement of warning signs relative to the location of a flagger.[28] Given the lack of evidence indicating the use of a flagger, or the need for one, we find Employer's appeal from the section 8604(d) citation must be sustained on this additional basis, as well.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ decision with respect to the citations for violations of sections 8602(e), 8604(a) and 8604(d), and reverses the decision to uphold the citation for the violation of section 3203(a). Employer's appeals are granted.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

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[28] The Board memorandum contained in the rulemaking file explains the amendment and states, "The effect of the proposed revision will be that the distance between the sign and the flagger will not be determined by the speed formula but rather the traffic approach speed and the physical conditions at the work site, as indicated in the 1990 'Manual'." The edition date of the Manual has been updated repeatedly since this initial amendment.